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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID ROJAS,

Defendant and Appellant.

G051521

(Super. Ct. No. 13WF0940)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and remanded with directions.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Susan E. Miller and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant David Rojas appeals the trial court's disposition of his petition for resentencing pursuant to Penal Code section 1170.18.¹ He raises numerous issues, which are complicated by an intervening opinion of this court, a reversal of that opinion by the California Supreme Court, and a new order by the trial court which fell in between the two. As we shall explain below, we affirm in some respects and remand the remaining issues for further consideration by the trial court.

I FACTS

In May 2013, defendant pleaded guilty to receiving stolen property. (§ 496, subd. (a).) He was sentenced to two years in state prison pursuant to a plea agreement which dismissed other charges and allegations, including seven prior strikes. He was ordered to pay various fines and fees. Among these were a \$240 state restitution fine (§ 1202.4), and a \$240 parole revocation fine, stayed unless supervision was revoked (§ 1202.45). Defendant was awarded 72 days of credits.

In November 2014, the voters approved Proposition 47, the "Safe Neighborhood and Schools Act." Proposition 47 reclassified certain offenses from felonies to misdemeanors and created a postconviction resentencing procedure for those convicted of felony offenses that have been reclassified. (§ 1170.18; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091-1093.) Among the crimes reclassified was receiving stolen property. (§ 1170.18, subds. (a), (b).)

An individual "currently serving a sentence" may petition for resentencing under section 1170.18, subdivision (a). Subdivision (b) states the court must recall the felony sentence of an eligible petitioner, and resentence the petitioner to a misdemeanor unless the court determines that doing so would unreasonably endanger the public.

¹ Subsequent statutory references are to the Penal Code unless otherwise indicated.

Under subdivision (d), a person resentenced under subdivision (b) is “given credit for time served” and is generally “subject to parole for one year following completion of his or her sentence.”

In contrast, section 1170.18, subdivision (f), someone who has “completed his or her sentence” of a reclassified offense may apply to have the conviction reclassified as a misdemeanor. Unlike subdivision (a), there is no period of parole under subdivision (f).

On February 17, 2015, defendant filed a petition for resentencing under section 1170.18. He was out of custody and on postrelease community supervision (PRCS) at the time. The court declined defendant’s request for relief under subdivision (f), and granted relief under subdivision (a), resentencing him to one year in county jail and one year of parole. The court’s decision to impose parole was based on defendant’s “significant prior background, which includes several strikes.” Noting that defendant had custody credits of 365 days, his jail time was deemed served.

On February 18, 2015, defendant filed a notice of appeal. On May 13, 2015, he filed his opening brief, arguing: 1) a person on parole or PRCS that has already served his or her sentence cannot have an additional year of parole imposed under section 1170.18, subdivision (d); 2) to the extent this court found section 1170.18, subdivision (a), applicable, the trial court erred by relying on dismissed priors in its decision to impose parole; 3) if this court rejected his first argument, the matter should be remanded to recalculate his parole period based on his custody credits; and 4) under sections 1202.4 and 1202.45 fines must be reduced to those applicable to misdemeanor convictions.

On June 26, 2015, this court issued its now superseded opinion in *People v. Morales* (2015) 238 Cal.App.4th 42, review granted August 26, 2015, S228030 (*Morales I*). This court came down on what would ultimately be the wrong side of the California Supreme Court’s opinion, and held a defendant in this situation could be sentenced to

parole even while currently under PRCS, but that custody credits must be used to reduce the parole period. (*Id.* at p. 50.) We also held that custody credits could be used to reduce fines. (*Id.* at p. 51.)

On July 21, the Attorney General filed its brief.

On August 6, defendant filed his reply brief, acknowledging *Morales I*, but asked this court to reconsider its holding on the issue of whether a parole term was proper, among other things. At a minimum, he argued he was entitled to have his parole time reduced by his custody credits.

On August 12, 2015, in an attempt to rectify what it now perceived was error, the trial court modified its order regarding defendant's petition in a manner consistent with *Morales I*. Because his total credits exceeded his sentence and one-year term of parole, the court immediately discharged defendant from parole. His remaining fines were deemed paid in full.

On June 16, 2016, the California Supreme Court decided *People v. Morales* (2016) 63 Cal.4th 399, 403 (*Morales II*), which, reversing this court, held that "credit for time served does not reduce the parole period." We requested further briefing from the parties after *Morales II* was decided. The parties concur that defendant's custody credits cannot be used to reduce the one-year parole period.

Defendant argued in his supplemental brief that based on the court's August 12, 2015 order, the issues regarding parole were now moot. If this court disagrees, he contends that *Morales II* only resolved the issue of using custody credits to reduce or eliminate the parole period.

In its supplemental brief, the Attorney General argued the trial court's August 12, 2015 order lacked jurisdiction, and improperly, under *Morales II*, used defendant's custody credits to eliminate any further time on parole. As of August 12, 2015, defendant had served approximately six months of the parole period. The Attorney General requested this court remand the case to the trial court to exercise its discretion as

to whether defendant should be required to serve his remaining parole period or be discharged under section 1170.18, subdivision (d).

We address these contentions below.

II

DISCUSSION

The Trial Court's August 12, 2015 Order

As we noted above, after *Morales I* was decided by this court, and while this case was actively pending on appeal, the trial court issued a new order regarding defendant's petition for resentencing. Defendant argues this renders many of the issues in this appeal moot, pointing out that the same situation occurred in *Morales II*. The *Morales II* court determined this court "can consider any issues regarding that order on remand. Even if this circumstance renders the issue technically moot in this particular case, we exercise our discretion to decide it because the issue is likely to recur, might otherwise evade appellate review, and is of continuing public interest." (*Morales II*, *supra*, 63 Cal.4th at p. 409.) We do not read this as offering any opinion on the validity of the trial court's order.

While we commend the trial court's attempt to quickly comply with *Morales I*, we conclude it lacked jurisdiction to make the modification because this appeal was pending. (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 929-930.) Section 1237.1 gives trial courts concurrent jurisdiction to correct the calculation of presentence credits while an appeal is pending, it applies only to mathematical or clerical errors, not substantive issues like those present here. (*People v. Delgado* (2012) 210 Cal.App.4th 761.) Therefore, the August 12 order is void. (*People v. Scarbrough*, *supra*, at p. 920.)

Defendant argues that the prosecution did not object after the trial court's August 12 order. Under principles of forfeiture, invited error and equitable estoppel, he

contends, any attempt to reinstate parole or fines should not be permitted. Defendant, unfortunately, did not develop these arguments at all, and we deem them waived on appeal. (See *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) He is free to make those arguments in the trial court on remand.

“Serving a Sentence”

Section 1170.18 distinguishes between those who have already completed their sentences and those who are still serving them. As we discussed earlier, those currently serving a sentence are generally subject to one year of parole under section 1170.18, subdivision (d), while those who have completed their sentences are not, under subdivision (f). The crux of the matter comes down to whether serving parole or PRCS constitute “serving a sentence” under section 1170.18. Because he was on PRCS at the time he filed the petition, defendant argues he was no longer “serving a sentence.”

As have various courts before us (including, implicitly, the *Morales II* court), we reject this contention. “[C]urrently serving a sentence” appearing in section 1170.18, subdivision (a), means “all persons . . . subject to judicial sanction under a felony conviction . . . rather than only those persons . . . actually confined.” (*People v. Davis* (2016) 246 Cal.App.4th 127, 142, fn. omitted, review granted July 13, 2016, S234324 (*Davis*).)²

It is within the trial court’s discretion to determine whether defendant should be released from parole and to calculate the remaining parole term if it decides otherwise. We remand for the trial court to make that decision in light of this opinion. Under section 1170.18, subdivision (e), the length of his parole cannot exceed the remainder of his PRCS term. (*Morales II, supra*, 63 Cal.4th at p. 409.)

² Review was granted on a different issue.

Use of Priors as Parole Factor

Defendant next argues it was an abuse of discretion for the trial court to consider his previous criminal history when deciding whether to sentence him to a year of parole. Under the abuse of discretion standard, the defendant has the burden to show the trial court's sentencing decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

A person resentenced under section 1170.18, subdivision (d), "shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." The statute provides no specific criteria for exercising that discretion. The only indication in the record with regard to how the trial court applied its discretion in this case was this statement: "I will be placing you on one-year parole. The reasons for that are your significant prior background, which includes several strikes."

Defendant claims this was improper because his plea agreement in the underlying case did not include an admission of the prior strikes. He also argues the court did not obtain a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, 758, which would have allowed it to consider dismissed counts in the underlying matter.

We find this unpersuasive. Defendant's seven prior strikes were dismissed for sentencing purposes in the underlying case, but they did not evaporate from his criminal record. Defendant presents no authority for the proposition that his prior criminal history is not a permissible or relevant factor in the parole determination under section 1170.18, subdivision (d). Further, there is no indication the trial court considered any dismissed substantive counts in the underlying case, and accordingly, a waiver pursuant to *Harvey* was unnecessary.

The Restitution and Parole Revocation Fines

Finally, defendant contends that in resentencing him, the trial court erred by failing to reduce the \$240 minimum felony fines imposed on him under sections 1202.4

and 1202.45 to the minimum fines allowable to one convicted of a misdemeanor.

Defendant did not raise this issue at the time of resentencing. His failure to request the trial court to reduce the amount of the fines constituted a waiver of the issue.

“[T]o encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims” (*People v. Scott* (1994) 9 Cal.4th 331, 351), unless the trial court imposes an “unauthorized sentence” (*id.* at p. 354), i.e., one that “could not lawfully be imposed under any circumstance in the particular case” (*ibid.*), the “lack of a timely and meaningful objection forfeits or waives the claim” (*id.* at p. 351). This rule applies to appellate claims challenging the amount of restitution. (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) Because the fines imposed on defendant were within the allowable range for a misdemeanor conviction, they were not “unauthorized.” By failing to raise the amount of the fines in his petition for resentencing or at the hearing on the petition, defendant waived any objection to the amount of the fines originally imposed on him.

While defendant argues this was an “unauthorized sentence” that can be corrected at any time, we disagree that principle applies here. At the time defendant was sentenced, the proper amount for these fines for a misdemeanor was between \$140 and \$1000. (Former §§ 1202.4, subd. (b)(1), 1202.45, subd. (b).) Accordingly, these fines were within the permissible limits for a misdemeanor at that time.

Defendant is entitled, however, to a recalculation of his fines and fees to determine if an offset is properly due to custody credits. (See *People v. Morris* (2015) 242 Cal.App.4th 94, 101-102.) On remand, the trial court shall recalculate the amount owed accordingly.

III
DISPOSITION

The fines and fees imposed under sections 1202.4 and 1202.45 are affirmed, subject to any offset due to recalculation of his custody credits. The matter is remanded to the trial court to conduct that recalculation. The court must also determine whether a further period of parole is proper under section 1170.18, subdivision (d), or to discharge defendant from parole.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.